No. 12,544

IN THE

United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION (a corporation),
Appellant,

vs.

C. R. MONAGHAN,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The above named appellee, C. R. Monaghan, presents this his Petition for Rehearing in said cause, and in support thereof respectfully represents:

I.

COUNSEL FOR APPELLEE HAD NO OPPORTUNITY TO ARGUE THE POINTS ON WHICH THE DECISION OF THE APPELLATE COURT WAS BASED.

The decision of the appellate court is based upon the theory of the case which was suggested neither in

pleadings, the testimony in support thereof, the briefs on appeal nor in the oral argument upon the appeal. Consequently the counsel for appellee was afforded no opportunity to present an argument in opposition to the conclusions arrived at and expressed in the opinion of the appellate court.

Lest this last statement may to the court seem unwarranted and not in accordance with the recollection of the judges who heard the argument and therefore create an unfavorable impression at the outset, may it be conceded that the presiding judge did quite clearly indicate by his questions to counsel his opinion that under the terms of the contract the dairymen were to receive supplemental payments for their milk, in addition to the flat payments made to them periodically, when, and only when, the Cooperative made a profit for the year. However, the presiding judge did not indicate that he inclined to this view because, as stated in the opinion, "the parties chose to abandon the Contract as written and act under a modification thereof." It is the last quoted statement, and other similar statements contained in the opinion of the appellate court which the writer asserts he had no opportunity to discuss or combat and which he is confident can be shown on further argument to be unsupported by any evidence in the case.

II.

FINDINGS OF FACT.

This case was tried before the court, a jury having been waived. The Findings of Fact were to the effect that plaintiff and his assignors sold their milk to the defendant in accordance with the provisions of paragraphs (6) and (7) of the Member's Standard Marketing Contract and not otherwise. (R. 126.) If there was substantial evidence to support these Findings, they should not be disturbed.

III.

THE MERITS OF THE CASE.

It is evident that in arriving at the conclusions expressed in the last two pages of its opinion, the appellate court labored under a false impression not only as to the facts of the case, but as to its moral and equitable aspects. The writer is confident that the argument in support of this petition will dispel that impression, at least to the extent of showing reasonable grounds for a rehearing.

IV.

STATUS OF THE CASE.

On December 29, 1947, the trial court rendered judgment for the appellee, hereinafter designated as plaintiff, and against the appellant, hereinafter designated

as defendant, for the sum of $31,245.34, with interest and costs.

Thereafter execution was issued on this judgment, the proceeds of levies made thereunder applied to the satisfaction thereof, and paid to the plaintiff by order of the trial judge dated March 10, 1948. (R. 131-133.)

Thereafter, on March 25, 1948, the defendant filed its Petition for Allowance of Appeal. (R. 133-134.) The appeal was allowed on March 26, 1948. (R. 142.) The judgment was reversed by the appellate court on April 26, 1951.

V.

THE ISSUES RAISED BY THE PLEADINGS.

The complaint alleged that the plaintiff sold his milk product to the defendant under the terms of a written contract called the Member's Standard Marketing Contract. (R. 2-3, par. II.) This allegation is admitted by the Answer. (R. 73, par. I.) The complaint further alleges that the defendant promised to pay for the milk so sold by the plaintiff according to the provisions of paragraphs (6) and (7) of the contract. This allegation is denied in the answer. (R. 74, par. III.)

The answer further affirmatively alleges that the milk sold by plaintiff to defendant was purchased by the defendant at a fixed price per hundred pounds, and that "after making the deductions authorized by paragraphs (7), (8) and (12) of the Marketing Agree-

ment, the plaintiff has been fully paid by the defendant for all milk sold and delivered to the defendant by the plaintiff." (R. 74, par. I and II.) Thus it is alleged and admitted in the pleadings that the plaintiff sold his milk to the defendant under the terms of the written contract and there is no suggestion of any modification thereof in the pleadings.

VI.

THE EVIDENCE.

The testimony on the part of the defendant was to a considerable extent devoted to attempting to establish that the milk sold and delivered by plaintiff to defendant was sold at a flat price under the provisions of paragraph (8) of the Contract.

There was also a nebulous theory advanced by some of defendant's witnesses that the payments for milk made subsequent to the periodical flat payments were dividends allocated to those units which made money for the Association. The appellate court disposed of these contentions adversely to the defendant and without much comment.

Both these contentions were revived in appellant's brief and in the oral argument, but there was no suggestion in either the testimony, the brief or the argument that there had been a modification of the written contract. We repeat, that the first suggestion of such a modification was made in the opinion of the appellate court.

VII.

ARGUMENT.

It is considered unnecessary to set forth the opinion of the appellate court in full. Only such portions will be quoted as are deemed especially pertinent.

On page 2 of the opinion the court states:

> "The trial court decided the case on what it deemed to be the requirements of the written contract. We think that contract was, subsequent to its execution, modified by the acts of the parties and by mutual consent."

It seems to be conceded in the quoted statement that the requirements of the written contract, as executed, were correctly interpreted by the trial court.

FINDINGS OF FACT.

The first paragraph of Finding of Fact V was as follows:

> "That during the period beginning December 1st, 1944, and ending November 30th, 1945, the plaintiff and his assignors sold and delivered to defendant 1,082,128 pounds of Grade A milk, and 176,986 pounds of Grade B milk for which defendant promised and agreed to pay plaintiff and his said assignors, according to the provisions of paragraphs (6) and (7) of the said contract, that is to say an amount representing plaintiff's interest and the interest of plaintiff's assignors in all milk and milk product resold by defendant

> with which plaintiff's milk was pooled and comingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph (7) of the said contract."

Whether or not the contract was modified "by the acts of the parties and by mutual consent" is, of course, a question of fact.

The appellant made proposed Findings of Fact (R. 138-140) but in none of them suggested that the contract was modified subsequent to its execution.

It certainly is remarkable that if there was any substantial evidence in support of the theory that the contract was modified it should have entirely escaped the notice of counsel for appellant, both at the trial, in appellant's brief and also in the oral argument on the appeal.

Throughout the entire proceedings the contention of the appellant as to the meaning of the contract has been that the contract meant, when executed, what the appellate court now says it means as modified by the acts of the parties and by mutual consent.

EVIDENCE IN SUPPORT OF FINDINGS OF THE TRIAL JUDGE.

The appellate court summarizes the evidence in support of the Findings of the Trial Court, heretofore quoted, as follows:

> "The District Court concluded that Paragraph 7 was applicable and relied on the testimony of certain of the dairymen that they understood

they were to be paid in accordance with Paragraph 7; also, the testimony of at least one of the former officers of the Cooperative that the Cooperative had endeavored to follow Paragraph 7 as closely as possible. The District Court adopted the accounts of the Cooperative (prepared for the purpose of allocating the net profit of the Cooperative, as hereinafter shown), to reflect the income and deductions attributable to the Dairy-Creamery Department under Paragraph 7. Thus the dairymen were considered entitled to the entire book profit credited to the Dairy-Creamery Department ($53,793.83) for '45, although the net profits of the Cooperative were $2,889.27."

The appellate court then proceeds as follows:

"We need not decide whether this accounting system satisfies the provisions of Paragraph 7 because the parties chose to abandon the contract as written and act under a modification thereof. It is not disputed that the Cooperative has at no time paid the dairymen in accordance with the provisions of Paragraph 7. It has made no effort to return to the dairymen in accordance with that paragraph, the proceeds fairly attributable to the milk sold by them to the Cooperative less appropriate attributable deductions."

We submit that the last quoted statements of the appellate court are not supported by any evidence in the case, which will be demonstrated by the argument on this petition.

We also submit that the appellate court has not stated all the evidence in support of the Findings of the District Court.

In the first place, there is the contract itself, under the terms of which the dairymen were to be paid according to the profit made on milk without regard to the profits of the Association as a whole.

In addition to this, it will be demonstrated that ever since the Association went into the milk business to any extent, which was in 1940, the additional payments made to the dairymen were based upon the profit made upon the sale of their milk after the deductions specified in the contract had been made, without any regard whatever to what the Association made as a whole.

In 1945 the dairymen were made two additional payments for their sales of milk during the fiscal year ending November 30, 1944. These payments aggregated $45,919.20 (Plaintiff's Ex. 6, page 16), which represented one payment of 20% of the total amount advanced on delivery of milk and one of 21.125% of the total amount so advanced. This percentage system was the simplest method that could be devised for apportioning to each producer his proportionate share of the profits, as required by paragraph (7) of the Contract.

Some confusion exists on account of the fact that the dairy and creamery are carried on the books as a single department. The dairy was purely a producers' unit while the creamery was almost entirely a consumers' unit, although it used a small portion of the dairymen's milk and bought and resold eggs produced by the farmer.

As the dairy and creamery used two buildings in common and employed some of the same labor, their operation expenses and indirect overhead were difficult to segregate.

For the fiscal year ending November 30, 1944, the net profit from the dairy-creamery operations, not counting rents, was $63,432.36. (Def. Ex. 1, page 19.)

This was after the deductions specified in the contract, as stated on page 3 of the opinion of the appellate court. Of this profit of $63,432.36, as stated before, the dairymen were made additional payments aggregating $45,919.30. The balance was retained as claimed creamery profits. The basis of this division of profits was never explained.

An attempt to do so was made by the witness Marvin Allyn, the Chief Accountant and Assistant General Manager of the Association, a perfectly honest witness. His testimony was voluminous and worth quoting in its entirety, if space permitted. However, the court is earnestly urged to read that portion beginning on page 281 and ending on page 285.

Allyn was a qualified witness. He majored in agriculture, did seminar work in cooperative marketing, was for a short period with the Farm Credit Administration and was in the employment of the Whatcom County Dairyman's Association from 1937, to January, 1947, except for a period of military service.

Allyn went into court prepared to show that the Creamery Branch of the Dairy-Creamery Department

was entitled to be credited with some portion of the entire book profit credited to the Dairy-Creamery Department ($53,793.83) for the year 1945. He was equipped with figures for that purpose. At no place in his testimony, which fills over 100 pages of the transcript, is there any suggestion that the dairymen were not entitled to be paid in accordance with the terms of the written contract.

After being questioned as to the proper division of the 1945 profit, on pages 282 to 284 of the Transcript of Record, Allyn testified as follows:

On Direct Examination

Q. Yes. All right, now then the proportion of profit: How was that arrived at? Was that in proportion to the proportion of sales?

A. In the same proportion.

Q. So, you figured the profit must have been in proportion to the sales?

A. That is right.

Q. That wouldn't necessarily be so, would it?

A. No. It must be—it was acceptable arbitrary formula.

Q. Well, so far as you know from everything you have here you don't know that the creamery made any money in 1945, do you?

A. Or the dairy—we know that together—

Q. Together they made $57,000?

A. Yes.

Q. But you don't know what part of that the creamery earned?

A. No.

Q. Nor that it earned any part of it?

A. That's right.

Q. This year they have started a new system down there so as to a year from now you will probably be able to give those figures on it?

A. That is right.

Q. You have inaugurated that new system yourself?

A. That is right.

Q. Because they had no system before that of segregating that proportion?

A. That is right. (R. 284-285.)

Now, in the spring of 1946, after the audit of the operations of the fiscal year ending November 30, 1945, the dairymen were informed that they could expect no additional payments for the 1945 sales.

The testimony is contradictory as to the reasons given by members of the Board of Directors to representatives of the dairymen for this situation.

Some of the dairymen testified that they were told in effect that they were entitled to the money, but that there was nothing to pay them with. The defendant's witness Stock, a former manager, testified that he had been taught in his business life that it is not proper to distribute earnings out of anything but earnings. That "it cannot come out of capital, and that was my reason for my decision and the answer I gave the boys at that time."

The dairymen were not furnished with a statement of their share of the book profit of the Creamery-Dairy Department, and never have been, because, as testified by Allyn, the Association had no system for segregating that proportion. He attempted to do so at

the trial by following the system which was applied for 1944, but finally gave it up, and testified as follows:

> Q. Now, Mr. Allyn, are the two years, 1944 and 1945, then, comparable in the breakdown between the Creamery Department and the Dairy Department? Can they be compared from the figures that are available?
>
> A. No they can not.
>
> Q. And what, then, about this testimony you gave us? Is it valid testimony as to the breakdown between the two, or should that be disregarded?
>
> A. From my standpoint it should be disregarded. (R. 566.)

The dairymen, Monaghan and his assignors, being afforded no information as to their share of the profits of 1945, because the association did not have it, brought suit for their share of the whole of the book profits of the Dairy-Creamery Department for the year 1945.

Their counsel, at least, fully expected that the defense would establish that the Creamery had earned some of this profit but under the circumstances the plaintiff had no other recourse than to sue for it all. The defense, as shown by Allyn's testimony, made an attempt to establish the Creamery's share, but failed and it was finally developed from the testimony, as found by the trial judge, that the Creamery made no part of the profit.

This was not surprising, as the association made losses in nearly all their other departments in 1945,

heavier losses than they had ever made before, of which we have any record. Their losses aggregated $54,113.31. This was under the management of Snodgrass, the man who first testified that the dairymen were not to be paid additional payments, unless the Co-Op made a profit as a whole.

This court has in its opinion adopted that theory, but by virtue of its view that the contract was modified.

We respectfully ask the court to carefully consider the necessary effect of its decision.

The Produce Department lost $9,631.04 in 1943, and $3,899.28 in 1944. (Defendant's Ex. I, page 3.)

It lost $20,319.12 in 1945. (Plaintiff's Ex. 6, page 19.)

It lost $30,359.12 in 1946. (Plaintiff's Ex. 3.)

The record does not show what the Produce Department made or lost in the prior years. The dairymen were not affected as they received additional payments every year after the association went into the business of selling fluid milk, as their profit from the previous year's operations.

The appellate court attaches some importance to the fact that these losses were not carried over from year to year, and that no effort was made to recover the amount of the loss from the producer. (Opinion, page 5.)

In other words, that the obligation was apparently cancelled.

A court action would necessitate a hundred or more separate suits. And judging from the results of the association's operations as shown above, in the other departments, the farmers might successfully defend on the ground of mismanagement.

To carry the account over would leave them perpetually in debt.

But evidently the association decided, "Why bother about it? We will take it out of the profits of the dairymen." Which is exactly what they did, and exactly what this court has held they had a right to do. This court has held that there is evidence in the case to the effect that the dairymen, by acquiescence or otherwise, agreed to absorb all the losses of all the departments before being entitled to any profit on their milk.

The By-Laws provide that proper deductions may be made for expenses and association obligations. (Sec. 5, By-Laws.)

These losses were not expenses, nor obligations, of the association.

Until this suit was brought the association never contemplated that the dairymen should absorb the losses of the Produce Department.

We submit the testimony of Marvin Allyn, who came to court prepared to establish the Creamery share of the Creamery-Dairy profits.

> Q. Now, do you know, having overpaid the farmers for '45, the sum of $20,319.12, is that now charged against those farmers?

A. No.

Q. Is that an indebtedness cancelled? How do they adjust that?

A. That is absorbed by the Association.

Q. Is that absorbed by this $57,000.00 profit?

A. *No, it is absorbed by the Association as a whole.*

Here is the testimony of the Chief Accountant and Assistant Manager of the Association and a man of vast experience with cooperative associations. It supports the Findings of the trial court.

Is it not reasonable that the losses made by the Association as a whole (the losses in each department were made by the Association as a whole no matter what employees conducted the operations) should be absorbed by the Association as a whole?

With due respect to the court we suggest that its decision leaves the dairyman producer in an impossible situation. He is confronted with the proposition that he must absorb the net loss of all the departments, and of any additional enterprises that the association may choose to embark upon, before he can expect a profit.

To require this, or to require the produce farmer to labor under an indebtedness on account of a loss made in the Produce Department, would not be consonant with the purposes of the Association as expressed in paragraph (18) of the contract.

> "(18) In view of the common purpose of the Association and the Alaska Rural Rehabilitation Corporation as set forth on page 1 of this Con-

> tract in promoting gainful agricultural activities on the land and allied activities on the part of members of this Association and the Association's obligations to coordinate its efforts for the same objective with those of said Corporation as provided for in the Articles of Incorporation and By-laws of the Association the Producer agrees that while occupying a home financed by said Corporation on government or other land or while occupying homes on patented land under contract of land and home purchase from said Corporation or otherwise he will abide by all rules and regulations of said Corporation concerning the use of said lands for agricultural purposes." (R. 69.)

The witness Marvin Allyn has testified, as hereinbefore quoted, that these losses in the Produce Department were absorbed by the Association as a whole, that they are not absorbed by the Dairy-Creamery profits, that they are not still owing, in other words, that they are written off. He was testifying with respect to the $20,319.12 loss in 1945. The same would be true with respect to the other years.

It seems reasonable that the association as a whole should absorb these losses since the association as a whole made the losses.

The dairymen, as part owners of the association, would necessarily suffer their proportionate share of the loss, not all of it. Under the appellate court's decision, the dairymen suffer the entire loss. The vegetable producer, who benefited to the extent of $20,319.12, suffers none of it.

expenses, indirect overhead, cost of goods sold, etc. The evidence indicates that it had nothing to do with the profits of the association as a whole, which were considerably less, in fact $55,606.15. It was 100% of the Dairy-Creamery profits. In 1943 the Dairy-Creamery netted $48,951. With rents, $52,665.13. The association suffered slight losses, so that the net profits as a whole were greater than the Dairy-Creamery profits. The Dairy-Creamery was again credited on the books with 100% of its profits, regardless of the association profits, and an arbitrary apportionment made to the dairymen, which was accepted by them without protest.

It is not contended that any dairymen were ever told that he would not be paid according to the contract, that he would have to absorb the losses of other departments.

It cannot be contended that the dairymen's acceptance of a profit when the association made a profit as a whole, is evidence of an agreement to waive the contract, when the association as a whole did not make money. If in one single year there had been such a waiver, that would be some evidence in support of the court's decision.

The closing statement in the court's opinion is as follows:

> "The appellee should not be permitted to modify the contract when it is to his benefit to do so and then reinstate it and insist upon strict performance when that position would benefit him most. We think that is what he is attempting to do here."

The appellee has never attempted to modify the contract. He maintains that he sold his milk under the terms of the original contract at all times. If the court means that the dairymen benefited at any time by measuring their profits by the profits of the Association as a whole the court is simply mistaken. Their profits have never been affected to the extent of a single dollar by the profits of the Association as a whole. They have always been measured, as is clearly shown by the audits, by the profits of the Dairy-Creamery Department, which the dairymen assumed and had a right to assume, were divided fairly between the Creamery and the Dairymen. There never has been any "exaggeration" of the profits of the dairymen, as stated on the last page of the court's opinion.

DEPRECIATION.

On page 7 of the opinion, the court also states that one of the principal factors in converting the Dairy Department from a losing to a profitable enterprise was the construction of the Dairy-Creamery plant at Anchorage. That the cost of this apparently was not allocated to the Dairy Department. That this method of bookkeeping tends to exaggerate the amount of "profits" attributable to the dairy products. The court is apparently mistaken about this.

This court has recently decided a case in which a question involving the rent on the lot on which this Dairy-Creamery plant was built. The association has a lease on the lot, now expiring in five years. The association built this plant on borrowed money.

Each year the depreciation has been charged to the Dairy-Creamery Department. It has been charged to the Dairy-Creamery as an operating expense. The operating expense of the Creamery and Dairy for 1944 are listed on page 23 of Defendant's Exhibit I.

The depreciation charged to the Creamery-Dairy for that year is $7,966.40. The total depreciation of all of the association property is $22,264.00. The Dairy-Creamery pays over one-third. Of course that depreciation includes the Palmer Creamery, for the latter is listed nowhere else.

The depreciation charged to the Dairy-Creamery Department for 1945 was $8,422.21, the total depreciation for that year was $25,434.55. (Plaintiff's Ex. 6, page 21.) Again the Creamery-Dairy pays more than one-third of the total. And, may it please the court, this depreciation is paid in cash, and withheld by the association from the gross receipts of the Dairy-Creamery sales, and, as the record shows, mostly from the milk sales. The operation expenses of the Dairy-Creamery in the same exhibit total $83,807.54. The total operating expenses of the entire association are $246,888.05. Again the Creamery-Dairy pays more than a third. The Indirect Overhead charged to the Creamery-Dairy for 1945, was $45,121.31, the total Indirect Overhead was $128,653.39.

More than 35%. And far the greater part of all these totals came out of the Dairy profits, as the Creamery made little, if any, profit in 1945.

The opinion states that the dairymen were aware that the Cooperative was organized to remain in busi-

ness, not to "bleed itself out of existence". May we state that the figures show that the dairymen have kept the Cooperative alive ever since the dairy plant was built. Before that the Creamery was "heavily in the red" according to the witness Stock. The dairymen should not be penalized because the Cooperative had a bad year.

We stated early in this petition, that we believed the appellate court labored under a false impression as to the moral and equitable aspects of this case. That was stated because the last page of the court's opinion seemed to indicate the view that the dairyman was "out for his pound of flesh". If the attitude of the dairymen in this case seemed to the court unconscionable or grasping to the extent of affecting the court's decision, then it seems proper to state, that it could be proved, if relevant, that the home-owners referred to in paragraph (18) of the contract above quoted, particularly the dairymen, are still heavily in debt on the purchase price of their homes, some to the extent of several thousand dollars; that the average dairyman, while he makes a greater gross income, makes a less net income than the produce farmer. This is because for nearly seven months in the year, the produce farmer can supplement his income by working at high wages for Army contractors, for the Alaska Road Commission and in other employment, while the dairymen must stay at home the entire year in order to care for, feed and milk his cows. These facts can be proved by government reports on the Matanuska Valley farm situation.

The Findings of the trial court are further supported by the testimony of several of the dairymen to the effect that at a dairy meeting when Stock was manager (Stock retired as manager in 1943) there was a discussion over the question of cutting the advance price of milk and Stock told the dairymen that he couldn't see any objection to cutting the price, because all the money over the operating cost would come back to the dairymen.

McAllister testified substantially as above stated. (R. 201.) He was corroborated by several other dairymen. By Arvid Johnson. (R. 425.) By Aaron Rempel who testified that he came to Palmer in February, 1944, brought nine cows with him and started delivering milk in March. That Snodgrass, the then manager, explained to him that there was a cash payment, and that after the year was over he would receive two more payments. Snodgrass showed him a check he had just received for his 1943 production and told him he would get another later on. (R. 389.)

Clarence Quarnstrom testified that Stock said to the dairymen at a meeting where a cut in price was discussed, "What are you fellows crabbing about in the cut of price in milk? If the dairy makes any money there is nobody but you fellows can get a nickle of it; nobody else can touch it." (R. 400.)

THE FINDINGS OF FACT.

This court has upset the Findings of the District Court.

We believe the rule in all jurisdictions to be that, as stated in Vol. 5, C.J.S., page 686, subsection c:

> "Even when they are being reviewed on the grounds that they are insufficiently supported or are erroneous as a matter of law, the trial court's fact findings will never be lightly disturbed by the appellate court."

Citing Federal and other cases.

> "Under the rules set forth in subsection c above, the appellate court in determining the sufficiency of the evidence to support the findings will indulge in every presumption in their favor, and give due weight to the trial court's superior advantages in passing on the facts, and judging the credibility of the witnesses."

5 C.J.S., 700 and cases cited.

> "According to statements or pronouncements of varying import the findings are to be regarded or considered as adequately supported and left undisturbed if the record discloses that they are sustained by material and competent evidence (5 C.J.S., 700 and numerous federal decisions under note 51), some or any competent or admissible evidence (5 C.J.S., 707 and federal and other decisions under note 52), evidence not inherently improbable or unworthy of belief upon its face, etc. 5 C.J.S., 709 and cases cited under Note 53."

The trial of this case commenced on March 13th and was concluded on July 15th. It occupied five or six

days given wholly to the hearing of testimony. It was submitted on written briefs. The trial court had the numerous exhibits, the Reports of Audit before him throughout the trial. He heard all the witnesses and was in a position to weed out the sham and frivolous defenses and to grasp the true situation. He reviewed the case in a concise and clear opinion (R. 590-595) after an exhaustive study of what he termed the detailed and illuminating briefs of counsel.

The trial court's Findings should not be lightly disturbed.

The appellate court does not agree with the findings of the trial court, and has upset the latter's findings because of this difference of opinion. More than a difference of opinion should be required. To justify a reversal on the facts, the evidence should at least clearly preponderate in favor of the appellate court's opinion, and there should be insufficient competent evidence to support the findings of the trial court. We urge that the evidence preponderates in favor of the trial court's findings.

THE BY-LAWS.

The By-Laws, and the contract drawn thereunder were designed to promote individual enterprise and not collectivism. It was not intended that the producer should bear the losses of the Cooperative, incurred in its transactions with other producers. They state:

> "Section 5. Distribution of Income. (a) The principal monetary gain to a member through his

> selling activities is his share of the proceeds received from the final sale of his product after *proper deductions* (italics ours) are made for expenses and Association obligations above referred to." (Referring to Section 3.)

The Cooperative in paragraph (7) of the contract designated what it considered the proper deductions. It was surely not contemplated that the Association losses in other departments should be absorbed by the producer who made a profit.

Article XV of the By-Laws provides a method for amending the By-Laws. It forbids certain amendments. It forbids any amendment which will,

> "deprive any member of rights and privileges then existing, or so to amend the by-laws as to effect a fundamental change in the policies of the Association."

We earnestly contend that to modify the contract so as to defeat its purposes is not within the power of the Association, and could not be done even by amendment of the By-Laws.

This court has decided that such an amendment of the contract was, in fact, made by the parties. The court has not considered the far reaching effect of its decision. It limits, in fact, as applied to this case, defeats, the producers' right to "direct monetary gain" which section 5 declares the contract provided for in section 3 of the By-Laws contemplates.

The decision of the court takes from the profits of the dairymen $20,319.20 which the association lost in

its dealings with the potato farmer. Whether it lost this money through overpayment, or by mismanagement, is immaterial. The Trading Post lost $10,315.52. It sold groceries which cost $100,165.22 at a mark-up of 9.23%, which was business suicide in any country. Both losses were made under the management of Snodgrass.

All this money, by the court's decision, has been taken directly out of the profits of the dairymen. They have been made to contribute to the support of the produce farmer. This is collectivism, and contrary to the purposes of the Cooperative according to its Articles.

CONCLUSION.

The writer apologizes to the court for the length of this petition. He has been compelled to present an argument on questions of fact, and has perhaps manifested less tolerance of the views he opposes than would be the case were only questions of law involved, as is usually the case in the appellate court.

The writer believes the decision of the appellate court does his clients grave injustice. He feels that court has a misconception of the moral aspects of this case. That the court has labored under the impression that the dairymen have made extremely large profits and that the contract they seek to enforce is unfair to the Association.

Such is not the case. Very few of the dairymen have prospered. Their expenses are unusually high.

An independent dairy in Anchorage pays a greater flat price for dairymen's milk than the plaintiff ever received altogether, including his supplemental payments. It buys its milk from dairy farmers in the Matanuska Valley, who either have never belonged to the Association, or have managed to shake loose from it, which few can, on account of their indebtedness. It hauls the milk just as far and pasteurizes it in Anchorage, and pays the producer the equivalent of 22c a quart, flat price, and makes money. We recognize that these facts are not in evidence, but they are relevant to the appellate court's opinion which is partially based upon a contrary conception of the situation.

We have called attention to the fact, as shown by the record, that the judgment in this case was collected and the proceeds disbursed more than three years before the appeal was argued. That leaves the plaintiff and his assignors in an extremely embarrassing predicament for the plaintiff has left the Territory. We do not urge that this situation should affect the fate of this petition, for it is not the duty of the court to extricate us from this predicament. But the writer feels that the situation calls for the most careful consideration of this petition.

We believe that the court's attention has been called to evidence in support of the trial court's findings which it did not consider in its opinion. We know that the court did not notice that the dairymen have been and are in fact paying for the dairy building in Anchorage, as well as the depreciation on the Creamery in Palmer. We have called attention to the evidence

of Marvin Allyn, who represented the Association at the trial and who testified positively that the Association as a whole absorbed the loss in the Produce Department. All these facts and other testimony in support of the trial court's findings have been called to this court's attention, which were not considered in arriving at the decision. Also defendant's answer supports the findings. Possibly additional facts can be gleaned from the record, and at least additional argument can be made on a rehearing, which may impel the appellate court to reverse its decision and affirm that of the district court.

Counsel for appellee earnestly requests an opportunity for reargument.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the district court be upon further consideration affirmed.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
George B. Grigsby,
Attorney for Appellee and Petitioner.

Certificate of Counsel

I, George B. Grigsby, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in my judgment well founded and that it is not interposed for delay.

Dated, Anchorage, Alaska,
May 31, 1951.

George B. Grigsby,
Counsel for Appellee and Petitioner.